Arasa Kumaran a/l Tulasi & Ors v Timbalan Menteri Keselamatan Dalam Negeri & Ors

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO (1) 44–89 OF 2005, (2) 45–86 OF 2005 & (3) 45–92 OF 2005
ABDUL KADIR MUSA J
20 MARCH 2006

Criminal Procedure — Habeas corpus — Proper procedure — Whether any defect at the detention level would not make the relevant subsequent 'Detention Order' — Dentention under Emergency (Public Order and Prevention of Crime) Ordinance 1969 and Dangerous Drugs (Special Preventive Measures) Act 1985 — Whether same considerations apply

Three applications were dealt together as the main issues for determination are identical to each other. The applicants applied to this court for a writ of habeas corpus. The detention was made under the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the 1969 Ord'). It was contended that any defect at the detention level would not make the relevant subsequent 'Detention Order' ('D/O') unlawful following the case of *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309 which was decided under s 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the 1985 Act'). The issue here is whether *Mohd Faizal*'s case can be blanketly applied to all applications under the 1969 Ord and whether there were 'procedural considerations', both 'substantively procedural' as well as 'procedurally procedural', for applications made under each of those two aforesaid legislations.

Held, allowing the applications:

(1) An 'arrest without warrant' under s 3(1) of the 1985 Act and the power to issue D/O under s 6(1) of the same Act confine to only activities 'relating to' or 'associated with' the trafficking of dangerous drugs. The equivalent provisions in ss 3(1) and 4(1) of the 1969 Ord speak of 'suppression of violence' or 'prevention of crimes involving violence'. From that, the former Legislation deals with more technical crimes of 'trafficking in dangerous drugs' which only trained professionals can 'subjectively' evaluate the 'legislative intended activities', such as, 'any police officer' spoken of by the said s 3(1), but the latter legislation certainly deals with less technical aspect of crimes (see para 5).

(2) The second major difference affecting procedural requirements between the aforesaid two legislations is the absence of the equivalent s 5 of the 1985 Act in the 1969 Ord. By virtue of the said s 5(1), it specifically provides some form of 'legal safeguard(s)' to the person 'arrested and detained' under s 3(2)(a)–(c) for 'subjective' reason(s) stipulated by s 6(1) of the 1985 Act. That 'legal

safeguard(s)' is (are) tailored to take the form of 'mandatory intervention' by an Inquiry Officer ('I/O') appointed in writing by the Minister under s 5(1) of the same Act. The said I/O must be legally qualified who is not a 'police officer'. The absence of such an 'equivalent officer' in the 1969 Ord justifiably conclude that, there should be different justiciable judicial considerations procedurally for the 1985 Act and the 1969 Ord. Such a conclusion is further enhanced by the presence of procedural mandatory requirements to be religiously complied with by 'the police officer making an investigation pertaining to a person arrested and detained' under s 3(1) of the 1985 Act by virtue of s 3(3) of the same Act. There is no such equivalent requirement in the 1969 Ord (see para 9).

[Bahasa Malaysia summary

Tiga permohonan diuruskan bersama oleh kerana isu utama untuk penentuan adalah sama satu dengan lain. Pemohon-pemohon memohon kepada mahkamah ini untuk satu writ habeas corpus. Penahanan dibuat di bawah Ordinan Darurat (Ketenteraman Awam dan Mencegah Jenayah) 1969 ('Ordinan 1969'). Ia ditegaskan bahawa sebarang kecacatan pada tahap penahanan tidak akan menjadikan 'Perintah Penahanan' ('P/P') relevan yang berikutnya menyalahi undang-undang mengikut kes *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309 di mana ia diputuskan di bawah s 3 Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta 1985'). Isu di sini ialah sama ada kes Mohd Faizal boleh digunakan secara keseluruhan kepada kesemua permohonan-permohonan di bawah Ordinan 1969 dan sama ada terdapat 'pertimbangan prosedur', kedua-dua 'prosedur substantif' dan juga 'tatacara prosedur', untuk permohonan-permohonan yang dibuat di bawah salah satu daripada kedua-dua perundangan itu.

Diputuskan, membenarkan permohonan-permohonan tersebut:

(1) Satu 'penangkapan tanpa waran' di bawah s 3(1) Akta 1985 dan kuasa mengeluarkan P/P di bawah s 6(1) Akta yang sama hanya dihadkan kepada kegiatan-kegiatan 'berhubung dengan' atau 'berkaitan dengan' pengedaran dadah berbahaya. Peruntukan-peruntukan yang serupa di ss 3(1) dan 4(1) Ordinan 1969 menyatakan 'menghapuskan kekerasan' atau 'mencegah jenayah melibatkan kekerasan'. Dari situ, Akta 1985 berurus dengan jenayah yang lebih teknikal dari segi 'pengedaran dadah berbahaya' di mana hanya pakar-pakar yang dilatih boleh 'secara subjektif' menilai 'kegiatan-kegiatan yang ditujukan oleh perundangan', seperti 'sebarang pegawai polis' yang dikatakan oleh s 3(1), tetapi Ordinan 1969 lebih menjejaskan jenayah-jenayah yang tidak terlalu teknikal (lihat perenggan 5).

(2) Perbezaan kedua yang ketara melibatkan keperluan-keperluan prosedur di antara kedua-kedua perundangan ialah ketiadaan persamaan dengan s 5 Akta 1985 di dalam Ordinan 1969. Oleh kerana s 5(1) tersebut, secara spesifik membekalkan satu cara 'perlindungan undang-undang' kepada orang yang 'ditangkap dan ditahan' di bawah s 3(2)(a)-(c) dengan alasan-alasan 'subjektif'

yang disyaratkan oleh s 6(1) Akta 1985. 'Perlindungan undang-undang' itu adalah disesuaikan untuk membentuk satu 'pencelahan mandatori' oleh seseorang Pegawai Penyiasat ('PP') yang dilantik secara bertulis oleh Menteri di bawah s 5(1) Akta yang sama. PP tersebut mestilah berkelulusan undang-undang dan bukan seorang 'pegawai polis'. Ketiadaan 'pegawai yang setara' di dalam Ordinan 1969 memberikan alasan yang kukuh untuk menyimpulkan bahawa sepatutnya terdapat pertimbangan kehakiman yang berbeza dari segi prosedur untuk Akta 1985 dan Ordinan 1969. Kesimpulan ini selanjutnya lagi dipertingkatkan dengan kehadiran keperluan prosedur mandatori yang patut dipatuhi dengan sepenuhnya melalui 'pegawai polis yang melakukan penyiasatan berhubung dengan orang yang ditangkap dan ditahan' di bawah s 3(1) Akta 1985 disebabkan oleh s 3(3) Akta yang sama. Tiada keperluan yang sepadan di dalam Ordinan 1969 (lihat perenggan 9).]

Notes

For cases on proper procedure, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1991–2008.

Cases referred to

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2004] 1 CLJ 81 (distd)

Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2006] 1 MLJ 309 (distd)

Rasid bin Kulop Mohamad v Timbalan Menteri Dalam Negeri & Ors [2005] 2 MLJ 535 (folld)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3, 5, 6
Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 3(4), 4(1), 7C
Federal Constitution art 5
Internal Security Act 1960
Police Act 1967 s 2

N Sivananthan (Sivananthan) for the applicant in Criminal Application No 44-89-2005

Azari Harun for the respondents in Criminal Application No 44-89-2005.

Abd Shukor Ahmad (Baljit Singh Sidhu with him) (Shukor Baljit & Partners) for the applicant in Criminal Application No 44-86-2005.

Azari Harun for the respondents in Criminal Application No 44-86-2005.

Abd Shukor Ahmad (Baljit Singh Sidhu with him) (Shukor Baljit & Partners) for the applicant in Criminal Application No: 44-89-2005.

Asnawi Hanipah for the respondents in Criminal Application No: 44-89-2005.

Abdul Kadir Musa J:

[1] At the beginning of the hearing, parties agreed that all the three applications should be dealt with together since the main issues for the determination by this

court will be identical to each other; and so I agreed. As such, I accordingly classified them as follows:

(i) 44–89–2005 as Case No 1:

(ii) 44–86–2005 as Case No2; and

(iii) 44–92–2005 as Case No 3.

[2] In both cases Nos 2 and 3, En Baljit Singh agreed that he will adopt fully the submission of En Sivananthan, the learned counsel for Case No l. As such, it was agreed by both of them and En Azari Harun (acting for all the respondents in both the said cases) that En Sivananthan will address the court first. If at all there was a need, further submissions will then be made by En Baljit followed by En Asnawi Hanipah (for respondents) in case No 3.

[3] In a very brief submission by En Sivananthan, he reaffirmed his stand by relying on the case of *Rasid bin Kulop Mohamad v Timbalan Menteri Dalam Negeri & Ors* [2005] 2 MLJ 535. In that context, he drew the attention of the court that appeals of similar issues were to be heard by the Federal Court involving nine applications of similar nature on 14 November 2005. Unfortunately, the learned counsel for the appellants withdrew all their said appeals and were struck off by the Federal Court. That being so, it was contended by En Sivananthan (and fully agreed by En Baljit Singh) that the decision of the aforesaid *Rasid*'s case still stands. I cannot disagree with him with such contention which incidentally received not much resistance from En Azari.

[4] Be that as it may, En Azari however brought to my attention the case of *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309. Relying on the said case, he contended any defect at the detention level under s 3 of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the 1985 Act') would not make the relevant subsequent 'Detention Order' ('D/O') under s 6 of the 1985 Act by the Minister unlawful. In all probabilities I would have agreed with him if the aforesaid three applications before me were made under the 1985 Act on the principle of stare decisis, but they were not so. They were made under Emergency (Public Order and Prevention of Crime) Ordinance 1969 ('the 1969 Ord'). That being so, and with the greatest of respect, my humble analysis of the relevant sections of both the 1985 Act and the 1969 Ord led me to conclude that, the aforesaid *Mohd Faizal*'s case cannot be blanketly applied to all applications under the 1969 Ord. My such considered conclusion based on the said analysis demonstrates a clear obvious wisdom of the Legislator to have different 'procedural considerations', both 'substantively procedural' as well as 'procedurally procedural', for applications made under each of those two aforesaid legislations. The reasons being, inter alia, as explained below.

[5] An 'arrest without warrant' under s 3(1) of the 1985 Act and the power to issue D/O under s 6(1) of the same Act confine to only activities 'relating to' or 'associated with' the trafficking of dangerous drugs. The equivalent provisions in s 3(1) and 4(1) of the 1969 Ord speak of 'suppression of violence' or 'prevention of crimes involving violence'. From that, it is my inference that, the former Legislation deals with more

technical crimes of 'trafficking in dangerous drugs' which only trained professionals can 'subjectively' evaluate the 'legislative intended activities' referred to earlier, such as, 'any police officer' spoken of by the said s 3(1), but the latter legislation certainly deals with less technical aspect of crimes. My said conclusion finds support as illustrated below.

[6] Both ss 3(1) in both the aforesaid legislations start with the words 'Any police officer' with the power to arrest without any warrant but with one major difference in the context of the above conclusion. That difference is contained in s 3(4) of the 1969 Ord which states as follows:

> (4) The powers conferred upon a police officer by subsections (1) and (2) *may* be exercised *by* any member of the security forces, *by* any person performing the duties of guard or watchman in a protected place, and *by* any other person generally authorised in that behalf by a Chief Police Officer. (Emphasis added.)

[7] Thus it is obvious that, other than 'any police officer' as defined by s 2 of the Police Act 1967, any other less 'professionally trained' person described by the said s 3(4) is legally allowed to 'arrest and detain' 'subjectively' any person acting within the 'objective purview' of s 4(1) of the 1969 Ord.. The equivalent provision is alien to the 1985 Act. It is understandably so for it reflects clearly the wisdom of the Legislature mentioned earlier of not necessarily requiring technically trained professional to decide as to what constitutes 'violence' within the meaning of the said s 4(1) as opposed to 'trafficking in dangerous drugs' found in s 6(1) of the 1985 Act.

[8] The second major difference affecting procedural requirements between the aforesaid two legislations is the absence of the equivalent s 5 of the 1985 Act in the 1969 Ord. The said s 5 provides:

> 5. Inquiry Officer.
>
> (1) There shall be appointed by the Minister in writing such number of Inquiry Officers as may be necessary for the purposes of this Act:
>
> Provided that no police officer nor any person who is not legally qualified shall be appointed to be an Inquiry Officer.
>
> (2) Upon receiving the report under subsection (3) of section 3, the Inquiry Officer shall inquire whether there are reasonable grounds for believing that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs.
>
> (3) An Inquiry Officer may, in his discretion, for the purpose of subsection (2) —
>
> (a) require the attendance before him of a person detained under section 3;
>
> (b) procure and receive all such evidence, whether oral or in writing and whether the same be admissible or not under any written law for the time being in force relating to evidence or criminal procedure, which he may think necessary or desirable;
>
> (c) summon and examine witnesses on oath or affirmation, and may for those purposes administer any oath or affirmation;
>
> (d) require the production of any document or other thing in his opinion relevant to the case.

A (4) An Inquiry Officer shall submit his report in writing to the Minister within such period as may be prescribed by the Minister by regulations made under this Act.

[9] By virtue of the said s 5(1), it specifically provides some form of 'legal safeguard(s)' to the person 'arrested and detained' ('A & D') under s 3(2)(a)-(c) for B 'subjective' reason(s) stipulated by s 6(1) of the 1985 Act. That 'legal safeguard(s)' is (are) tailored to take the form of 'mandatory intervention' by an Inquiry Officer ('I/O') appointed in writing by the Minister under s 5(1) of the same Act. The said I/O must be legally qualified who is not a 'police officer'. The absence of such an 'equivalent officer' in the 1969 Ord compelled me to justifiably conclude that, there C should be different justiciable judicial considerations procedurally for the 1985 Act and the 1969 Ord. Such a conclusion is further enhanced by the presence of procedural mandatory requirements to be religiously complied with by 'the police officer making an investigation pertaining to a person arrested and detained' under s 3(1) of the 1985 Act by virtue of s 3(3) of the same Act. There is no such equivalent D requirement in the 1969 Ord.

[10] The said s 3(3) provides:

(3) *[The aforesaid police officer] shall cause a copy of the complete report* of the investigation *to be submitted* — E

(a) *to an [I/O]* ….; and

(b) *to the Minister*, …. (Emphasis added.)

F **[11]** As to 'why?' such requirements were not so provided in the 1969 Ord can only be attributed to, in my considered view, the reservoir of wisdom and experience of the Legislator to have legislatively intended that both the aforesaid Legislations are to be treated and justiciably considered fey the court differently. Further support of my such conclusion is made crystally clear when an in-depth comparative analysis of s 4(1) of the 1969 Ord and s 6(1) of the 1985 Act is appreciated.

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[12] In the said s 4(1), it begins with the word 'if' whilst s 6(1) starts with the word 'whenever'. Both the words 'if' and 'whenever' empower the Minister to issue the necessary D/O 'when' he is 'subjectively satisfied' that 'It; is necessary' to do so in accordance with the dictate of any of the objects of the aforesaid subsections, as the H case may be. Nowhere in either those two sub-sections it speaks of the Minister have the necessary power of arrest similar to that provided to 'any police officer' under sub-ss 3(1)-(3) of the 1969 Ord or any of those persons stipulated in sub-s 3(4) of the same Ordinance. The same is also true with the effect of the chemistry of section 6(1) and sub-ss (1) & (2) of s 3 of the 1985 Act. Thus it can be concluded that even though the Minister has the power to issue the relevant D/O, he certainly has no I power to arrest similar to 'any police officer' or any other persons as explained earlier.

[13] From the above, I can humbly draw two identical conclusions to 'how' procedurally in relation to 'when' the Minister can come to such 'satisfaction' within the contexts of those two aforesaid sections.

[14] There are:

(1) Personally; or

(2) From report envisaged by s 3(3)(c) of the 1969 Ord and s 3(2)(c) of the 1985 Act; or

(3) The combination of (1) and (2) above.

[15] Insofar as (1) is concerned, in all probabilities, it would not be wrong for me to conclude and I am permitted to take judicial notice that no D/O has ever been issued base solely on his 'personal subjective test' of satisfaction of any of the objects provided by those two aforesaid sections. As such, I ruled put (1) above to be the basis of such issuance. If that can be accepted, the mostly like situation must therefore be platformed on either (2) or (3) above. If the Minister is to avoid any form of criticism of 'any possible abuse of power', he should avoid (3) above which, I personally believe the Minister, in his wisdom and pool of experience, will appreciate and adopt. If that is adopted by the Minister, it is only logical and practicably reasonable to conclude that the most common practice adopted by the Minister will be based on (3) above. By doing so, it clearly shows that s 3(3) is 'inter-dependent' with s 4(1) of the 1969 Ord; and likewise with s 3(2) and s 6(1) of the 1985 Act.

[16] As pointed out earlier above, since the Minister has no power of arrest, for him to act under (2) above, there must be prior A & D under s 3(a) & (b) and s 3(2)(a) & (b) of the 1969 Ord and the 1985 Act respectively. Under all those sub-sections, there is no reference to the requirement 'to report to the Minister' of such A & D. Such a 'report' is only mentioned in ss 3(3)(c) and 3(2)(c) of the 1969 Ord. and the 1985 Act respectively. It is mandatorily required to do so by "a police officer of or above the rank of Deputy Superintendent' (ie 'senior police officer' by definition of s 2 of the Police Act 1967, which also applies to the 'police officer' referred to in the respective subjections (a) and (b) of section 3 of both aforesaid Legislations), if further 'investigation and detention' of such an A and D person is necessary after the permitted 'forty-eight hours' (ss 3(3)(b) and 3(2)(b) of the 1969 Ord and 1985 Act respectively) for a period of 'more than thirty days' (s 3(3)(c) of the 1969 Ord) or 'for more than fourteen days' (s 3(2)(c) of the 1985 Act) but shall 'not [exceed] sixty-plays' (ss 3(3) and 3(2) respectively of the aforesaid legislations). That 'report' to the Minister is the report of 'the circumstances of the arrest and detention' of such A & D person. '[T]he circumstances of the … detention …' referred to, must therefore include 'the place' where such A and D person being detained for the purposes of the aforesaid sub-subsection (a)–(c): thus the relevance of 'appreciative determination of 'substantive procedural requirements' of the aforesaid sub-subsection (a) of the aforesaid legislations cannot be justiciary ignored by the court for the purposes of protecting the said A and D person's constitutional rights under art 5(1) of the Federal Constitution.

[17] From the above, it would only be reasonable to conclude that, it is only at that stage the Minister is in a position to evaluate 'subjectively' whether or not to issue the necessary D/O for the first time. In actual practice, there is no way the said A and D person will know whether or not what was/were contained in the relevant 'report' justifies or justify him to lodge any form of complaint 'to a High Court or any judge

thereof as entrenched in art 5(2) of the Federal Constitution. The first available opportunity to do so. in practice, to such A and D person is when he is being served with the relevant D/O by the Minister. The relevant part of art 5 provides clearly as follows:

> 5. (1) No person shall be deprived of his … personal liberty save in accordance with Law.
>
> (2) Where complaint is made to a High Court or any judge thereof that a person is being *unlawfully detained* the Court shall inquire into the complaint *and, unless satisfied that the detention is lawful, shall order him to* be produced before the Court and released him. (Emphasis added.)

[18] and I am positively sure the Minister in determining whether or not to issue any D/O is appreciatively 'satisfied' or 'presumed to be so satisfied' that by the presence of such a constitutional provision there should not be any breach of any of the 'substantive procedural requirements' elaborately discussed in the aforesaid *Rasid*'s case by 'any police officer' involved with the relevant A & D. His barometer for coming to that conclusion must surely be, based on the above discussion, either (1) solely on the 'report' referred to above, or (2) cumulative nett effect of the said 'report' and the Minister's own knowledge before or after receiving such 'report', but before issuing the relevant D/O by applying his 'non-justiciable test of 'satisfaction' which clearly established that, s 3(3)(a)–(c) is 'inter-dependent' with s 4(1) of the 1969 Ord, as with section 3(2)(a)-(c) and s 6(1) of the 1985 Act.

[19] Having established above, it is therefore justified for me to conclude that:

(A) *Should there be* any such aforesaid breach by any 'police officer', the Minister *should not* issue the relevant D/O *after* the expiry of the stipulated 60 days referred to in ss 3(3) and 3(2) of the 1969 Ord and the 1985 Act respectively;

(B) If there is no such breach, the Minister *can independently* either:

(i) issue the relevant D/O; or

(ii) Still decides *not* to issue the same;

(C) If the Minister relies on his *'presumed satisfaction'* that, there was no such breach, he has the option:

(i) to issue the relevant D/O; or

(ii) *not* to issue the same.

[20] From the said (A)–(C), if (A) be the case, there should not be any justifiable criticism against the Minister at all. It is entirely up to such A and D person whether or not to take any appropriate consequential legal action(s) against the appropriate authority or authorities for unlawfully 'arresting' and or 'detaining' him by virtue of art 5(1) and (2) of the Federal Constitution. If (B)(i) is applicable, any application for a writ of habeas corpus should be dismissed. Similarly under (B)(i), any such application should not be allowed, unless it can be proved to the satisfaction of the court that, at the level of the Ministerial consideration, the Minister himself has breached any of the 'substantive procedural requirements' in issuing the relevant

D/O, whereby the court is justiciary able to order a writ of habeas corpus in favour of such A and D person by virtue of s 7C of the 1969 Ord. In the case of situation of C(i), if the Minister's 'presumed satisfaction' is proved, on the fact, the result similar to (B)(i). the end result of the court should;be, not to issue writ of habeas corpus to such A and D, unless the relevant part of s 7(c) of the 1969 Ord is in favour of such an A and D person. Lastly, if such 'presumed satisfaction' is followed by any breach of any 'substantive procedural requirements', either at section 3(3) (a)-(c) or 6(1) level, the court is under a constitutional duty to issue a writ of habeas corpus by virtue of art 5(2) of the Federal Constitution. In such a situation, it cannot be said that such an A and D person was lawfully 'detained'. By applying the 'inter-dependant' approach elaborated above, I am of considered view, to that extent, *Mohd Faizal*'s case aforesaid is not applicable to the applications made under the 1969 Ord.

[21] Be that as it may, there is another major reason, in my humble view, as to why the aforesaid *Mohd Faisal*'s case should not be applicable to the applications made under the 1969 Ord since there is no equivalent provision(s) under the said Ord. similar in effect to ss 3(3), 5 and 6(1)(a) and (b) of the 1985 Act.

[22] In s 3(3) of the 1985 Act, it speaks of 'The police officer making an investigation …' in respect of a person A and D under s 3(2)(a)–(c) of the same Act is required to submit '… the complete report of the investigation' to:

(a) an Inquiry Officer (s 3(3)(a)); and

(b) the Minister (s 3(3)(b),ibid.).

[23] The said 'police officer making an investigation' need not necessarily be 'a police officer of or above the rank of Deputy Superintendent' who is required to 'report' to the Minister of the 'circumstances of the arrest and detention' referred to in s 3(2)(c) of the 1985 Act similar to s 3(3)(c) of the 1969 Ord. Under the latter, there is no equivalent 'Inquiry Officer' or the need to submit 'complete report of the investigation' either to such 'Inquiry Officer' and or to 'the Minister'. Thus it is my conclusion that, the 'police officer' making the first 'arrest and detention' under s 3(i) of the 1985 Act must therefore be the same 'police officer' to prepare 'the complete report of [his] investigation [into his arrest and detention under s 3(i)]' to be submitted to (a) the Inquiry Officer and (b) the Minister under s 3(3) of the same Act. The 'substantive procedural requirement' of preparing such similar 'complete report' aforesaid is alien to 'any police officer' referred to in any of the sub-ss (1)–(4) of s 3 of the 1969 Ord. The presence of the word 'shall' in s 3(3) of the 1985 Act makes it mandatory for such 'police officer' to send such a 'complete report' to both the Inquiry Officer and the Minister 'within such period as may be prescribed by the Minister …'. The 'police officer' mentioned in the relevant sections of the 1985 Act must therefore be any 'senior police officer' defined by s 2 of the Police Act 1967.

[24] The importance of the presence of the words '… within such period as may be prescribed by the Minister …' in respect of submitting the 'complete report of the investigation' pertaining to a person arrested and detained under s 3(2) of the 1985 Act becomes significantly apparent when it is read together with the word 'after'

found in s 6(1) of the same Act justifying as to why the aforesaid *Mohd Faizal*'s case should not be blanketly applicable to the applications made under the 1969 Ord. Such a conclusion is further supported by the effect of the chemistry of ss 5 and 6(1)(b) of the 1985 Act. Their equivalents are not made available by the legislator in the 1969 Ord.

[25] 'Why' should 'the complete report of the investigation' be submitted to the Inquiry Officer (s 3(3)(a) of the 1985 Act) and to the Minister (s 3(3)(b)) 'within such period …' is because the Minister can only issue a D/O under s 6(l) 'after' 'considering' (1) 'the complete report of investigation' aforesaid (s 6(1)(a)) and (2) 'the report of the Inquiry Officer' (s 6(1)(b)). There is no such similar mandatory requirement imposed upon the Minister in 'considering' whether or not to issue a D/O under s 4(1) of the 1969 Ord.

[26] The presence of the word 'and' after paragraph (a) to s 6(1) of the 1985 Act has a conjunctive effect to paragraph (b) of the said section. That being so, insofar as the Minister is concerned in the light of the word 'after' aforesaid, 'within such period as may be prescribed by the Minister' ('such period') Cannot exceed sixty (60) days by virtue of s 3(2) of the same Act. Insofar as the Inquiry Officer is concerned s 5(4) for the purposes of the Minister's consideration under s 6(1) of the said Act, 'such period' must therefore be within the permitted 60 days aforesaid.

[27] The said s 5(4) states:

> (4) An Inquiry Officer [appointed under s 5(1)ibid.] shall submit his report in writing to the Minister within such period as may be prescribed by the Minister by regulations made under this Act.

[28] His 'report' referred thereto is the one mentioned by s 6(1)(b) of the same Act. Thus, it would be natural to conclude that his such 'report' will be essentially based on 'the complete report of the investigation' submitted to him by the 'police officer making an investigation pertaining to a person arrested and detained' under s 3(2) by virtue of s 3(3) of the same Act; a clear characteristic of 'inter-dependence' of the 'police officer's report' (s 3(3)) and 'the Inquiry Officer's report to the Minister'. Upon receiving the said 'police report', it is mandatory for the Inquiry Officer under s 5(2) of the 1985 Act to 'inquire whether there are reasonable grounds for believing that such [A and D] person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs' which is the same consideration required of the Minister before he decides 'subjectively' whether or not to issue a D/O under s 6(1) of the same Act. For the purposes of such inquiry, the Inquiry Officer is given vast 'judicial powers' under s 5(3) of the said Act including 'the attendance' before him of the person detained under section 3 (s 5(3)(a)).

[29] The said section 5(3)(a) provides:

> (3) An Inquiry Officer, may, in his discretion, *for the* of section (2) — *(a) require the attendance before him of a person detained under section 3:* (Emphasis added.)

[30] In addition to the above, he is empowered to 'procure and receive all such evidence, whether oral or in writing …' (s 5(3)(b)) relevant to his inquiry under s 5(2) of the 1985 Act. For the same purposes, he is able to 'summon and examine the witnesses on oath or affirmation (s 5(3)(c)) and or 'require the production of any document or other thing … relevant to the case.' (s 5(3)(d), ibid.). Such an inquiry giving such vast powers to the Inquiry Officer who is legally qualified but not being a 'police officer' (s 5(1)) can be equated to, in my considered opinion, an 'Inquiry' into a 'complaint … made to a High Court or any judge thereof' as envisaged by: Article 5(2) of the Federal Constitution. By doing so, and by virtue of him being legally qualified, he will be able to determine, both in law and in fact, whether or not 'such a detained person' was 'lawfully detained' in the light of the aforesaid art 5(2). He is certainly in the position to do so by exercising his power under the aforesaid s 5(3)(a) after considering all the facts before him collected by him after invoking paragraphs (b)–(c) of s 5(3) aforesaid. It is therefore incumbent upon him to state in writing in his 'report' to the Minister under s 5(4), whether or not such 'arrest and detention' reported by the 'police officer' to the Minister under the aforesaid s 5(3) was lawful or otherwise in the light of art 5(1) and (2) of the Federal Constitution. As such, any breach of any of the 'substantive procedural requirements' by the 'police officer' at the said 'arrest and detention' level should therefore be considered by the Inquiry Officer to be unlawful and accordingly advised the Minister in his report to the Minister not to issue the D/O under 6(1). It is up to the Minister whether to accept the Inquiry Officer's advice or not, but he can only do so 'after considering' (s 6(1)) both the 'reports' submitted to him by (a) the 'police officer' concerned (s 6(1)(a)) and (b) the Inquiry Officer (s 6(1)(b)); a clear evidence of 'inter-dependence' as explained earlier. 'How?' and 'why?' are as explained below.

[31] If the Minister decides not to issue D/O based on the 'Inquiry Officer's said advice, I would conclude that both the Minister and the Inquiry Officer are in consonant with the court in discharging its constitutional duty as explained above in issuing a writ of habeas corpus for breaching any of the 'substantive procedural requirements' at the 'arrest and detention' level by such 'police officer'. On the other hand, in spite of such an advice, if the Minister still decide to issue a D/O under s 6(1), he must have 'subjectively' based his decision on:

(1) his personal knowledge; or

(2) 'the complete report of investigation' submitted to him by the 'police officer'; or

(3) Combination of (1) and (2) above.

[32] Form all preventive detention cases before the court, it would not be wrong for me to conclude that no D/O is ever issued by the Minister based solely on (1) above. By not so issuing D/O, he steers away from any accusation of 'possible exercise of his power in bad faith' or 'abuse of his power'. If he is to act upon personal knowledge, it would be most prudent for him to at least counter- check 'his personal knowledge' as to the A and D person's activities with 'the complete report of investigation' submitted to him by such 'police officer'; hence based on (3) above. However, in all probabilities, he would have based on the aforesaid 'complete report of investigation' referred to by s 3(3)(b) of the 1985 Act; and act based on (2) above,

whereby s 4(1) of the same Act, when examined in further detail, will again exhibit another piece of evidence of 'inter-dependence' elaborated earlier.

[33] Alien to the 1969 Ord, the relevant part of the said s 4(1) of the 1985 Act provides:

> (1) For the purpose of *satisfying* the Minister *that an order under subsection (1) of section 6 should be made and* for the purpose of enabling the Minister *to furnish a statement under, paragraph (b) of subsection(2)of section (9),* a police officer making an investigation [s 3(3)] … *may* examine orally any person supposed to be acquitted with the fact and circumstances of the case …. (Emphasis added.)

[34] The said 'purpose of satisfying the Minister' and 'for the purpose of enabling the Minister to furnish [the relevant] statement' supports my conclusion that, in all probabilities, due to the 'inter-dependence' concept under present discussion, not only the Minister will not act solely on his 'personal knowledge' but will not be able to do so without the assistance 'of the complete report of the investigation' to be submitted to him under the aforesaid s 3(3)(b). The first of the two limbs of the said s 4(1) is more relevant at 'investigation stage', whilst the second limb is certainly an anticipation for fulfilling one of the 'substantive procedural requirements' (s 9(2)(b)) at the 'ministerial level'.

[35] Premised on the above analysis, if there is any defect at first stage and detected by the Minister, he should not issue D/O in compliance with what has been entrenched in art 5(2) of the Federal Constitution. If he still issues a D/O, and the matter is brought and proved to the satisfaction of the court by a person affected by the said Minister's D/O issued under s 6(1) (and as pointed out earlier that, in practice, the first available opportunity for such person to lodge his 'complaint' under art 5(2) Federal Constitution is after being served with such D/O) reveals such defect, then the court must not be reluctant to discharge its constitutional duty in issuing a writ of habeas corpus in favour of such a person. In that respect, I strongly hold that, the relevant parts of the ouster provisions in s 7C of the 1969 Ord and s 11C of the 1985 Act which speaks of 'any question on compliance with any procedural requirement …' should be clearly identified conclusively as (a) 'substantively procedural' and (b) 'procedurally procedural': hence the applicability of the aforesaid *Rasid Kulop*'s case which, to a certain extent and with the greatest of respect, distinguishes the aforesaid *Mohd Faizal*'s case in material particulars.

[36] On the other hand, the aforesaid second limb, provides even greater strength of support to my conceptual conclusion of 'inter-dependence' aforesaid. This is because all the relevant parts of the ouster provisions of all preventive legislations as established in the aforesaid *Mohd Faizal*'s case should, on the contrary based on my analysis of the said s 4(1) clearly demonstrates that, the Minister needs the required 'complete report of investigation' before he can issue the D/O by reason of the said s 9(2)(b). The word 'representation' mentioned thereto by a person affected by the Minister's such D/O made pursuant to s 6(1) can, in humble and considered conclusion, be equated as tyeinq equivalent in effect and impact to 'the complaint' spoken of in art 5(2) of the Federal Constitution. Thus, the fact that, s 4(1) speaks

of 'satisfying the Minister' to issue a D/O under the said s 6(1) on the strength of the 'statement' in the nature and for the purpose of such person's right under the said s 9(2)(b), conclusively show that, the Minister is not that completely independent without having to rely on the said 'complete report …' in reaching his 'subjective satisfaction' in issuing a D/O, more so if there is a breach of any of the 'substantive procedural requirements'. That being so, it shows that, the aforesaid *Mohd Faizal*'s case could not and should not be applicable to the applications made under the 1969 Ord.

[37] Having discussed above, I must point out here that my learned brother judge in deciding the application under the 1969 Ord in the case of *Selva Kumar a/l Tamil Selvom* aforesaid, which is more in line with the reasoning in the aforesaid *Mohd Faizal*'s case, did not have the benefit of that case. He was relying amongst others, on the ouster provision based on the case of *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2004] 1 CLJ 81: a case under Internal Security Act 1960 which is more in para materia with the 1969 Ord, except of its purposes. Unfortunately, and with the greatest of respect, the aforesaid *Nasaruddin*'s case was not approached in an analytical manner as I did in the present case. As such, I must, with the same respect to my learned brother, differ with his decision and stand firm with what I have decided in the aforesaid *Rasid Kulop*'s case.

[38] In the aforesaid *Rasid Kulop*'s case, I have analytically decided that, the 'police officers' in exercising their powers under section 3(3)(a) or (b) of the Ord which is also similarly applicable and s 3(2)(a) or (b) of the 1985 Act are substantively required address the relevant documents & the proper and appropriate 'other police officer(s)' (for example, the one(s) referred to under s 3(1),(2) and (4) of the Ord or s 3(1) of the 1985 Act) to detain the A and D person failed to comply with one of the 'procedural substantive requirements' as reflected in the relevant documents exhibited in all the three applications before me. Such non-compliance had the effect of vitiating the legality of the proper exercise of power by the Minister,

[39] I also note that, despite the aforesaid *Rasid Kulop*'s case being decided on 17 September 2004, to date the forms used by the 'police officers' under s 3(3)(a) or (b) of the 1969 Ord and s 3(2)(a) or (b) of the 1985 Act, which were amongst the main thrust of my decision in the aforesaid *Rasid Kulop*'s case, have yet to be accordingly rectified in order to be in consonant with one of the legislative 'substantive procedural requirements'. Consequential to such 'substantive' non-compliance and on the premises of the above, I therefore allowed all the applications and ordered that writ of habeas corpus to be issued accordingly.

Applications allowed.

Reported by Sally Kee